In-Terminal Services Corporation *and* Patrick McInnis. Case 13–CA–29566

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On October 21, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge, applying a terse *Wright Line* analysis,[2] found that the Respondent had violated Section 8(a)(3) by discharging union activist Patrick McInnis 7 days after he was hired because he had spoken to other employees about bringing in a union. The judge rejected the Respondent's contention that McInnis was discharged because he had violated its hardhat safety rule and had said, the second time he was caught violating the rule by Checkpoint Supervisor Newhall, that he did not like the hardhat rule and thought it ought to be changed.

We will assume, solely for the purpose of our discussion infra, that the General Counsel established a prima facie case. We find, however, contrary to the judge, that the prima facie case, if made at all, was rebutted by the Respondent. Accordingly, we shall dismiss the complaint.

Patrick McInnis was hired on June 18, 1990,[3] as a trailer inspector at the Respondent's Chicago terminal. The Respondent performs recordkeeping and inspection services for the Santa Fe Railroad. The Chicago terminal operates 24 hours a day. There are approximately 13 or 14 employees on the day shift where McInnis worked. McInnis began work on Monday, June 18, and by Friday, June 22, the Respondent had decided to discharge him. McInnis was discharged when he reported to work on Monday, June 25.

McInnis had been given a hardhat by Checkpoint Supervisor Chris Newhall on June 18, and McInnis knew he had to wear it when inspecting trailers. Rule 11.9 of the Respondent's safety rules provides:

> All employees engaged in activities outside office space or enclosed vehicle cab must wear a hard hat and high visibility vest or approved equivalent at all times.

On Tuesday, June 19, Newhall caught McInnis not wearing his hardhat and told him to put the hat on. On Thursday, June 21, McInnis was caught for the same violation a second time by Newhall. At that time, McInnis told Newhall that he did not like the rule and that he thought that it should be changed.

Newhall consulted Terminal Manager John Sheehan and they agreed to discharge McInnis because he had violated the rule and had exhibited a poor attitude regarding safety. District Manager Greg Mangieri approved the discharge, and McInnis was terminated on June 25.

Although McInnis engaged in protected activity by speaking to employees about the Union, we disagree with the judge's finding that McInnis' union activity[4] was the reason for his discharge. Rather, we find that the Respondent's reliance on his failure to wear his hardhat on two occasions and his statement that he did not like the hardhat rule was not a pretext and led to his discharge.

In our view, the judge's conclusion that the Respondent's asserted reason for discharging McInnis was a pretext is contrary to the evidence and is inconsistent with his findings concerning the Respondent's stepped-up safety campaign. That campaign began long before McInnis was employed.

The judge found that the Respondent's hardhat rule was a ''good idea'' and he commended the Respondent's concern for employee safety. He noted that the implementation of the safety rules dramatically reduced the number of job-related injuries. The judge also found that ''clearly and without question McInnis twice violated the rule on the wearing of the hard hats and let management know he didn't like the rule.'' These incidents occurred during McInnis' probationary period within his first 4 days of employment with the Respondent.

The judge relied almost exclusively on what he found to be disparate punishment to support his conclusion that the Respondent unlawfully discharged

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] All dates are in 1990.

[4] The judge inferred knowledge of McInnis' union activity under the ''small plant doctrine.'' As set forth above, for discussion purposes we shall assume that the Respondent had knowledge of the union activity. We do not, however, necessarily adopt the judge's finding that the small plant doctrine applies to the facts of this case.

McInnis. We find, on close scrutiny of all the evidence, that the Respondent did not act disparately in its treatment of McInnis and that its action was consistent with its strict enforcement of its safety program.

The record shows, and the judge found, that the Respondent had implemented a well-publicized safety campaign in January 1990. The Respondent's increased emphasis on safety dramatically reduced the number of employee injuries. In the spring of 1990, before McInnis was employed, the Respondent began to strictly enforce its hardhat rule. Prior to the strict enforcement of the rule, the Respondent held a safety meeting on June 6 to explain that the wearing of hardhats was mandatory. It additionally posted a notice warning the employees that they would be subject to discipline, including discharge, if they failed to comply with the rule. It is against this background that the Respondent discharged McInnis for failing to wear his hardhat on two occasions.

In finding that McInnis was treated in a disparate fashion, the judge noted that at this same facility other employees had not worn their hardhats and had not been punished or were merely warned. Contrary to the judge, we find that those incidents are distinguishable and do not support a finding of disparate treatment. Thus, former employees Paresi and Cave testified, in essence, that when Checkpoint Supervisor Newhall found them not wearing their hardhats they were merely told to put them on. We find, as did the judge, that on the first occasion that Newhall found McInnis not wearing his hat he merely told him to put it on. Thus, the warning by Newhall was fully consistent with his treatment of Paresi and Cave and does not demonstrate disparate treatment of McInnis.

The judge found that employee Charisse Major was caught twice by Newhall not wearing her hardhat and was told to put it on. On the second occasion she was told that she could be fired for not wearing the hat but that, although the second incident occurred in May or June 1990, Major did not even receive a written warning.

Both of the incidents involving Major, however, occurred before McInnis began working for the Respondent, and on the second occasion Newhall told her that people were going to start getting fired for not wearing their hardhats. Thereafter, employees began wearing their hardhats all the time because the rule was being strictly enforced.

Similarly, employee Wolf testified that Newhall warned him numerous times to wear his hardhat. The judge found, however, that those warnings occurred before February 1990, which was well before the time when the Respondent began to enforce its rule on hardhats more vigorously.

The judge apparently also finds evidence of disparate treatment in the fact that only 2 of the Respondent's 700 employees at 24 terminals have been discharged for similar misconduct. We find, however, that this is consistent with the undisputed fact that the Respondent has been stressing its safety program with renewed vigor, i.e., it suggests that the employees are, for the most part, obeying the safety rules, as evidenced by the substantial decline in the number of accidents.

In addition to the foregoing, the judge found that McInnis' status as a probationary employee was irrelevant because an employer cannot discharge an employee for an unlawful reason even if he is a probationary employee. Although the judge's statement is correct, he misapprehended the Respondent's contention. The Respondent's emphasis on McInnis' probationary status was directed towards showing that he was not subject to its system of progressive discipline, not that he was not protected under the Act.

We find, based on the foregoing, and assuming that the General Counsel presented a prima facie case, that the case was rebutted by the Respondent, which demonstrated that McInnis was discharged for the lawful reason of disobeying its valid ''safety'' rules and not for engaging in protected concerted activity.

ORDER

The complaint is dismissed.

Scott A. Gore, Esq., for the General Counsel.
Patrick W. Jordan, Esq. and *Julie Collins Nelson, Esq.*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On June 9, 1990, Patrick McInnis, an individual, filed a charge against In-Terminal Services Corporation (Respondent).

On December 31, 1990, the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint, which, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when it discharged Patrick McInnis on June 25, 1990, because of his support for the Union and because he engaged in protected concerted activity. Respondent filed an answer in which it admitted that it discharged and failed to reinstate Patrick McInnis but denies it violated the Act in any way. I find that the General Counsel has proved the allegations in the complaint and will order the appropriate remedy, to include reinstatement and backpay.

A hearing was held before me in Chicago, Illinois, on July 9, 1991.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent In-Terminal Services Corporation, a corporation with an office and place of business in Hazel Crest, Illinois, has been engaged in the business of performing record-keeping and inspection services for the Santa Fe Railroad.

During the fiscal year prior to the issuance of the complaint, Respondent, in the course and conduct of its business operations described above, provided services valued in excess of $50,000 for the Santa Fe Railroad, an enterprise directly engaged in interstate commerce and within the jurisdiction of the National Labor Relations Board.

Respondent admits, and I find, that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Teamsters Local 705 (the Union) is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

Patrick McInnis, a young man, had worked for the Santa Fe Railroad at its Chicago terminal. He had been a trailer inspector and later a console operator. Respondent began to take over the operation of the Santa Fe terminal back in 1989. It completed its takeover of all jobs at the terminal in June 1990. On June 18, 1990, Patrick McInnis began work as a trailer inspector for Respondent. June 18, 1990, was a Monday and McInnis had worked at the yard as a Santa Fe employee up to the prior Friday, i.e., June 15, 1990.

The facility in question was an intermodal terminal where highway trailers were loaded on and off of railroad cars.

A trailer inspector would check the paperwork to ensure that the trailer being loaded on or off the railroad car was the correct trailer and check to see if the trailer was damaged in any way and ensure that its tires were properly inflated, etc. The terminal in this case had an inbound or westbound checkpoint and an outbound or eastbound checkpoint. The inbound (westbound) checkpoint was approximately one-quarter of a mile from the outbound (eastbound) checkpoint.

McInnis was assigned to work at the outbound (eastbound) checkpoint but occasionally, if the need arose, he would work at the inbound (westbound) checkpoint.

McInnis began his employment with Respondent on Monday, June 18, 1990, and by Friday, June 22, 1990, Respondent had decided to discharge him. McInnis was told he was fired when he reported for work on Monday, June 25, 1990.

Respondent claims that McInnis was fired because he did not on two occasions wear a hardhat when he was supposed to and because he said that the hardhat rule was stupid and should be changed.

The General Counsel, on the other hand, claims McInnis' violation of the hardhat rule was a pretext and that McInnis was fired because he wanted to bring in a union to represent himself and his fellow employees and had spoken about bringing in a union with a number of his fellow employees.

Rule 11.9 of the In-Terminal Services safety rules provides as follows:

> All employees engaged in activities outside office space or enclosed vehicle cab must wear a hard hat and high visibility vest or approved equivalent at all times.

McInnis admits he did not wear his hardhat all the time and acknowledges that he was caught by Checkpoint Supervisor Chris Newhall not wearing his hat on two occasions. The issue is what was the real motivation for the discharge of Patrick McInnis.

B. *Protected Concerted Activity*

Patrick McInnis testified and was corroborated by the credited testimony of Domenic Paresi that McInnis and Paresi discussed getting Teamsters Local 705 to represent them and their fellow employees. It was agreed that Paresi would contact the Union and McInnis would talk to the employees. Paresi and McInnis agreed on this prior to McInnis becoming an employee of Respondent on June 18, 1990.

McInnis discussed his idea of bringing in the Union with a number of his fellow employees. In addition to Paresi he spoke with employees Ashford, Potochnic, Bell, Marrs, Major, Mroz, Akin, and Slattery. McInnis was corroborated by a number of witnesses and I credit his testimony on this point. McInnis estimates that he spoke about bringing in the Union with one-half to three-fourths of his fellow employees. He spoke with his fellow employees about the Union during his 1-week employment with Respondent, i.e., between June 18 and 22, 1990.

Accordingly there can be no doubt about the fact that McInnis engaged in activity protected by Section 7 of the Act.

C. *Violation of the Hardhat Rule*

Obviously, Respondent's hardhat rule is not only legal but probably a good idea. Respondent is to be commended for being as concerned about employee safety as it is. Respondent's implementation of safety rules has dramatically reduced the number of on-the-job injuries sustained by its employees.

McInnis was given a hardhat to wear when he received an employee orientation from Checkpoint Supervisor Chris Newhall on June 18, 1990. Newhall testified that McInnis was told he was a probationary employee and could be fired for any reason within the first 90 days of his employment, that wearing the hardhat was for safety reasons, that McInnis signed for and read a copy of Respondent's safety rules, which contained the rule on hardhats set out above, and that McInnis was given some safety films to watch.

McInnis testified that if he signed for the safety rules he did not read them and he did not view any safety films. Last, McInnis denies he was told by Newhall that he was a probationary employee.

The key points of agreement between Newhall and McInnis, however, are that McInnis was indeed furnished a hardhat and he knew that he was supposed to wear it when inspecting trailers.

Once on Tuesday, June 19, 1990, and once again on Thursday, June 21, 1990, Checkpoint Supervisor Chris Newhall caught Pat McInnis not wearing his hardhat when he should have been. This is not in dispute. When caught not

wearing his hardhat on Tuesday, McInnis was simply told to put it on and he did. On Thursday Newhall and McInnis engaged in a conversation about the wearing of the hat. According to Newhall McInnis said that wearing the hardhat was stupid and according to McInnis Newhall said that wearing the hardhat may be a stupid rule but McInnis had to comply in any event. Suffice it to say on Thursday when McInnis was caught for the second time not wearing his hardhat when he should have been the two men had a conversation the upshot of which is McInnis telling Newhall that he does not like the rule on the wearing of hardhats and thinks it should be changed. By way of background McInnis had worked for about 1-1/2 years as an inspector on the ground for the Santa Fe Railroad before he became a Santa Fe console operator and the inspectors for Santa Fe, who did the same work as McInnis was now doing for Respondent, did *not* wear hardhats.

Clearly and without question McInnis twice violated the rule on the wearing of the hardhats and let management know he did not like the rule.

Newhall testified that he advised Terminal Manager John Sheehan about what happened and they agreed to discharge probationary employee McInnis because he violated the rule on the wearing of hardhats and manifested an attitude regarding safety that they did not like. They then checked with District Manager Greg Mangieri who, according to Newhall and Sheehan, approved the discharge. Sheehan corroborated Newhall. Sheehan and Newhall, in addition, both testified that they did *not* know of McInnis' union activity. There is no *direct* evidence that they did know of it.

D. *Respondent's Knowledge of McInnis' Activity on Behalf of the Union*

The decision to discharge McInnis was made by Terminal Manager John Sheehan and Checkpoint Supervisor Chris Newhall. They deny they had any knowledge of McInnis' activity on behalf of the Union. I do not believe them.

The distance between the east and west checkpoints is only one-fourth of a mile. Sheehan and Newhall moved about the terminal and although their offices were at the westbound end and McInnis primarily worked at the eastbound end both men moved about the terminal quite a bit.

Sheehan and Newhall worked the day shift and according to Newhall there were only 13 or 14 employees on duty during that shift. McInnis worked the day shift. The terminal operated 24 hours a day but only had about 39 employees total according to Sheehan. McInnis credibly testified that he contacted and discussed bringing in the Union with no less than one-half to three-fourths of the employees, and named eight of them at the hearing. Newhall, in particular, impressed me as a person who had his hand on the pulse of this operation and knew exactly what was going on at the facility. Bill Potochnic testified that he was still an employee of Respondent and that he and everyone else knew that McInnis was trying to bring in a union. In short, McInnis' activity on behalf of the Union was common knowledge.

Accordingly this is an appropriate case for the application of the so-called ''small plant doctrine,''[1] where because of the smallness of the workplace in terms of personnel and the widespread discussion with fellow employees about the Union that I will infer that Sheehan and Newhall were aware of McInnis' union activity.

I also infer knowledge on the basis of all the evidence in the case, to include the ''small plant doctrine,'' and also taking into account the severity of the punishment for these minor offenses, i.e., discharge of a new employee (the capital punishment of the work place) for failing to wear a hardhat on two occasions, which I will discuss in further detail in section 3,E, below.

E. *Disparate Nature of the Punishment*

McInnis was fired, according to Respondent, because he was caught not wearing his hardhat on two occasions when he should have been and because he did not like the hardhat rule and said so to Newhall.

At this same facility other employees had not worn their hardhat and received either no punishment or just a verbal warning.

Domenic Paresi, who was fired shortly after McInnis was, credibly testified he was caught by Newhall not wearing his hardhat and was merely told to put it on. Rick Cave was caught by Newhall not wearing his hardhat and although he was told by Newhall that he could be fired for not wearing his hardhat he received no punishment whatsoever. Months later he voluntarily quit his employment with Respondent. Scott Wolf, who also voluntarily quit Respondent's employ, testified that Newhall saw him numerous times without his hardhat on and merely told him to put it on.[2] Charisse Major was caught twice by Newhall not wearing her hardhat and was told to put it on and on the second occasion was told that she could be fired for not wearing it. This second incident occurred in May or June 1990 and Major did not even receive a written warning. In short, there was amble credible testimony that many employees at this terminal did not wear their hardhats and none, except McInnis, received even a written warning while McInnis was fired.

Respondent runs 24 terminals. McInnis worked at one of them. Respondent has some 700 employees. Only two, other than McInnis, were fired for similar misconduct, i.e., Wally Godby in Colorado for not wearing ''hard hat or protective vest'' and Norman McKenzie in Texas for *repeatedly* not wearing his hardhat.

It is obvious to me that McInnis was treated in a disparate fashion. In my judgment the only reason for this is McInnis' union activity. No other explanation makes sense.

The evidence at the hearing proves to me by at least a preponderance of the evidence that McInnis engaged in activity protected by Section 7 of the Act, Respondent knew of it, and discharged him because of it. Accordingly, Respondent violated Section 8(a)(1) and (3) of the Act. I reach this conclusion applying the analysis the Board used in its landmark *Wright Line* decision.[3]

The real reason for the discharge was *not* McInnis' failure to wear his hardhat on two occasions and his expressions to Newhall that he did not like the hardhat rule. The real reason

[1] See *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981); *Coral Gables Convalescent Home*, 234 NLRB 1198 (1978).

[2] Wolf left Respondent's employ in February 1990 and there was evidence that Respondent more vigorously enforced the rule on hardhats subsequent to February 1990.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

was McInnis' union activity.[4] Whether McInnis was or was not a probationary employee is irrelevant in the sense that whether an employee was a probationary employee or not Respondent can not, in either case, discharge because of employee's protected activity on behalf of a union.

[4] The General Counsel attempted to prove that David Bell and William Potochnic were statutory supervisors and their knowledge of McInnis' union activity was attributable to Sheehan and Newhall who made the decision to discharge McInnis. Bell and Potochnic never told Sheehan and Newhall about McInnis' union activity and it was Sheehan and Newhall who made the decision to fire McInnis. Accordingly, it is irrelevant whether Bell and Potochnic were statutory supervisors or not. It is my conclusion, in any event, that Bell and Potochnic were not statutory supervisors at or before the time that McInnis was discharged. They may have become statutory supervisors when they were given authority to discipline employees in August or September 1990 but prior to that they were working foremen or leadmen. If Bell or Potochnic had been discharged on June 25, 1990, rather than McInnis and their discharge was because of their union activity with McInnis and others I would find their discharge illegal. Bell and Potochnic would be given the protection of the Act, which is something they would not have as statutory supervisors. See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). Bell and Potochnic's title was ''ground supervisor'' but the vast majority of the time they did the same job as the trailer inspectors, which was McInnis' job. They filled out absentee and tardiness reports and would tell inspectors to work at one checkpoint or the other depending on work load. Any discretion they exercised back in June 1990 was strictly of a routine nature.

REMEDY

The remedy in this case should include the posting of a notice and the reinstatement of Patrick McInnis with a make-whole remedy. Respondent should, of course, be ordered to cease and desist from this or similar misconduct.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Patrick McInnis because of his protected concerted activity on behalf of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]